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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent.*

On Certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

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(1)

AS TO STATEMENTS FROM THE RECORD BY RESPONDENT

(Their Brief, pp. 3 to 10)

While we do not feel the statements by respondent have added anything material to the statement as we have set it forth in our brief, to prevent any misapprehension on the part of the court as to what the record shows, we will briefly comment on some features of the statements as made.

They say (Br. p. 3) that "during the five years preceding his death, not taking into account the time he was absent in the World War, he had earned an average of more than $2000.00 a year."

To reach this average there must be included the extraordinarily high wages for a short period after the war from May, 1920, to July, 1921, when the railroad wages went to the peak of war prices, stated by the witness Dickson as being, so far as he knew, the highest rates ever paid railroad men in this country (R. 115), and as a matter of common knowledge, we think is the highest that were ever paid. These wages were absolutely abnormal and fell materially in July, 1921, and continued at the lower rate until the date of Moser's death, approximately twenty-one months later. Manifestly this last period is the only just and fair one to take as establishing Moser's earning capacity at the time of his death; and it is the one defendant took.

It is also manifest from the testimony of the jury that this was the figure they took—practically all of them.

But even if this average were warranted, it would not disturb the clear deduction under the record that the verdict cannot be sustained under the rules of the Kelly case.

Respondent further says that under the mortality tables Moser had an expectancy of 36.73 years. This was not Moser's expectancy—that is, not the expectancy of one engaged in the hazardous occupation of brakeman as to which calling the expectancy was 31.7 years (Our Br. p. 7, R. 122).

As to the probability of promotion, we have set forth all the testimony bearing on this question in sub-

stance, being the testimony of plaintiff's witness Grazier (our Br. pp. 7 to 10)—practically all the testimony there is on the matter in the record, and pages 10 and 11 have shown how the table submitted to the actuary was made up on the basis of possible promotion, and as we have stated in our brief, the fairness of the basic data as submitted to the actuary has at no time been challenged by the other side.

As to interest rates, pertinent to the extracts quoted by respondent (her brief pp. 4-5) the witness Harrison further testified that in placing money for people he gave them the benefit of his judgment and experience in placing the loans, "that is what I sell them, but it is paid for by the borrower; I give them the benefit of my experience in protecting them, and that is without cost to them and they get eight per cent for their money" (R. 81), and he testified to having placed about $2,000,000.00 in fifteen years with only one foreclosure and no loss (R. 80); further that there was more money loaned at higher rates than at the 3½ to 4½ per cent rates, and asked by respondent's counsel if he did not know that on any large loan on real estate "that you can get all the money you want at 6%?" he answered, "I do not know about that. On choice business property money is had at 6%" (R. 80).

The witness Temple did not testify he paid taxes at $3.50 on a valuation of $100.00. He said he rendered his notes for taxes and paid the taxes but did not know the city and county tax rate but thought it was approximately $3.50 (R. 97). As a practical matter, this is quite a different thing from saying that he

rendered his notes and all of them at the full face value.

It was the testimony of W. W. Thomas, who had had about forty years experience and had been chairman of the Tax Appraisement Board for several years in Houston, Texas, that vendor lien notes and like securities were not rendered for taxation and were not taxed; "maybe one per cent of them are; I dare say it would not reach that" (R. 119). And the witness Maverick testified practically to the same effect as to San Antonio, Texas, and there is no testimony to the contrary except what the witness Temple said as to his own taxes. (R. 120.)

The witness Cloud further testified immediately following what is quoted by respondent: "I furnish that experience to the people who trust their money to me to loan. I pass on securities for some of them; they can get that experience from prominent brokers without expense to them; perfectly responsible men who are in business all the time, and the borrower pays the fees for the broker's trouble and expenses." (R. 118.)

And on examination by respondent's counsel he testified: "I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property." (R. 118.)

As to extracts made by respondent from the testimony of the jury (their Br. pp. 5 to 10), nothing in

these extracts in any way militates against the clear showing made by the extracts in our brief (pp. 27-33) and the absolute showing made thereby that the jury did not attempt in any way to reduce the contributions to be expected through the years to a present value and did not understand the court to so charge, but so far as the extracts bear on this particular question they sustain our position.

(2)

L. & N. v. Holloway, 246 U. S. 525.

This case, extensively quoted from in respondent's brief at pages 18 to 22, is not in point here.

The special charge asked there arbitrarily told the jury that in reducing to present value that they must figure interest at 6%; and that they must be controlled as to how long the deceased would have lived by the figures of one expectancy table.

As we understand, it has been uniformly held that while admissible to be considered by the jury, expectancy tables are not conclusive; this for the manifest reason that they are an average and many men fall short of their expectancy and many men exceed it.

Our special charge put no such limitation on the jury. Indeed, it said nothing about the expectancy at all.

So far as determining for the jury a definite interest rate, this Court holds in the Kelly case that the court cannot undertake to do this; and the special

charge we urged does not attempt to establish any fixed rate.

But we submit this Court does lay down in the Kelly case a definite rule by which the rate of interest to be used shall be determined.

In the language of the opinion, a part of the opinion that respondent does not quote at all, although quoting very extensively from the Kelly case (their Br. pp. 15 to 18) as follows:

> "But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award."

There is no controversy in this case that "it is reasonable to suppose that interest" could "safely be earned upon the amount" to be awarded. Respondent does not make any question as to this but only makes a question as to what that rate should be.

And the standard for the determination of the rate as indicated by this Court—and we submit the only intelligent standard that can be fixed—is that it must be one that can be had on the money safely invested and secured.

As we understand the Kelly case it lays down this rule as fundamental—the rate must be safe—to use an unsafe rate would be to jeopardize the principal and would not be fair to the party seeking a recovery.

And defendant's special charge No. 8 (our Br. p. 23) expressly leaves it to the jury to determine the rate; but it must be a (see charge our Br. p. 23)

rate of interest that the testimony shows can be had n money *safely invested and secured*, as shown by he testimony in this case."

Safe investment and security was the limitation which the plaintiffs were entitled to have on the rate o be fixed.

But a safe and secure investment being determined, or a rate at which a safe and secure investment could be had, the defendant was entitled to have that rate taken. The extent of the plaintiff's right to limit had been reached.

And the jury is not only required to find a safe rate but this rate must also be *net* (R. 10) i. e., with all incidental expenses necessary to securing the investment at the safe rate which the lender would incur, taken off before fixing the rate.

The rate being determined on these bases, we submit that as a matter of law it became and should be taken as *the* rate to be used; the end of the discretion on the part of the jury has been reached.

Paraphrasing the language of Chief Justice Marshall in the Osborn case (substituting jury for court), 9 Wheat. 738:

> "Juries are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the jury to follow it,"

and the jury having determined the safe rate, there was no discretion to use any other.

And the defendant was as clearly entitled to have the jury take the highest net rate as the plaintiff was entitled to have them determine a rate that was safe and net.

To illustrate: The Railroad Company contended in this case and we think established by uncontradicted testimony that money could be safely invested at a net rate of eight per cent.

It is contended by the other side that the rates down as low as four per cent are the safe rates. The witness Harrison—a man of wide experience—indicated that six per cent was a practical minimum for even large loans in Texas. The full limit of the jury's discretion was to determine which one of these rates was *the* safe rate. And if the jury found that eight per cent was safe (which was the maximum discussed under the testimony), then defendant was entitled to have that rate used. If they had any question as to eight per cent, but found that six was safe—it was the next rate discussed—then that became established as the rate, that is, it was the highest safe rate. And there was certainly no discretion in the jury to pass below the highest safe rate and use another and lower safe rate and thereby swell the verdict. If the defendant was not entitled to this limitation then the jury could have used any rate below the highest safe rate that they saw fit and the case would be determined by the arbitrary will of the jury and not by the legal rules given them under the charge.

The special charge we asked took no question of fact properly for the determination of the jury from

them, but left it to them to determine the safe rate, only requiring them to use it when determined.

The only other assignment which this court considered in the Holloway case was one complaining that the damages were excessive, this Court holding that a question of excessiveness of the verdict is not reviewable here, citing *Southern Railway, etc., v. Bennett*, 233 U. S. 80, but this Court continues: "It does not appear in the case at bar as it did in Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, that the action of the Court of Civil Appeals in sustaining the verdict was necessarily based upon an erroneous theory of Federal law." (See Respondent's brief p. 22.)

While the excessiveness of the verdict was complained of in the Texas Courts by petitioner here, and it is our view that the verdict is manifestly excessive, the question of excessiveness purely, because of the rulings of this Court in the Holloway and Bennett cases is not urged here.

The question we do present to the Court is that an analysis of the record makes it absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and "that the award is clearly a violation thereof and grossly in excess of what would be a proper award under the rule." (See third specification of error, our brief pp. 34-35 and Subdivision (b) page 3.)

In *C. & O. v. Gainey*, 241 U. S. 494, this Court says:

> "On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the ver-

dict of $16,000.00 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention on the authority of Chesapeake & O. R. Co. v. Kelly, 160 Ky. 296, 169 S. W. 736, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the court of appeals in the present case (162 Ky. 427, 172 S. W. 918) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict.

"Since we have held in Chesapeake & O. R. Co. v. Kelly, this day decided (241 U. S. 485, ante 1117, 36 Sup. Ct. Rep. 630) that the theory is erroneous, it results that the judgment here under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

We analyze the testimony (our Br. pp. 39 to 45) and undertake to show from the record that the verdict is arrived at on the basis of adding together—aggregating—the probable annual contributions without any attempt to reduce to present values; and we think bring ourselves clearly within the ruling of the Gainey case, and respondent does not undertake to meet what we say, but confines himself to brief discussion of the question of excessiveness (Res. Br. 23-24), which is not the question before the Court.

(3)

Respondent (Br. p. 18) says:

> "Even if the charge of the Court had been insuffcient to instruct the jury specifically to reduce future expectations of pecuniary benefits to present values, petitioner cannot complain unless it had requested a supplemental instruction correctly presenting the same."

This was not the rule under Texas practice at the time this case was tried, and is not now. Objections being made at the proper time and place as required by the Texas statute to a charge submitting an issue, it is not necessary in order to save the error, to ask a special charge correcting the insufficiency.

This has been clearly and expressly held by the Supreme Court of Texas in the case of:

G. C. & S. F. Ry. Co. v. Conley, 113 Texas 472,

decided in March, 1924, in which case at pages 474 to 475 the Court, by the Chief Justice, says:

> "The case was tried on a general charge in which the jury was instructed, in part, as follows: 'A carrier of passengers is required to exercise the greatest degree of care which can be exercised under all the circumstances short of a warranty of its passengers.' The plaintiff in error, before the charge was read to the jury, objected thereto 'because the same does not state a correct rule of law and is more burdensome upon and imposes a greater duty upon a carrier of passengers than is required by law, and the defendant therefore says that the jury may be misled

thereby to defendant's injury.' These objections were in substance repeated to those paragraphs of the charge wherein the definition quoted above was applied to the facts of the case.

"The Court of Civil Appeals concluded that the charge complained of was not affirmatively erroneous, 'and therefore not reversible error in the absence of a requested instruction by appellant more fully explaining the degree of care required by appellant as a carrier of passengers.' *This was once the rule with reference to charges, not affirmatively erroneous.* Due, however, to statutory enactments, it is no longer so.

"Revised Statutes, Art. 1971, in so far as material here, reads as follows: 'The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be submitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived.'

"The Article further makes it the duty of the trial court to decide on and instruct the jury as to the law arising on the facts, and to submit all controverted questions of fact to the decision of the jury.

"Article 1985, relating to the submission of cases on special issues, requires the court to submit all the issues made by the pleadings, and provides that the failure to submit any issues shall not be deemed a ground for a reversal of the judgment unless its submission was requested in writing by the complaining party.

"These two statutes were enacted to accomplish the same purpose, and we think a failure to submit any particular issue under either statute can be reviewed on appeal only where the record shows a special charge was tendered on that issue.

"*But in the instance of a defective or erroneous charge on a subject or issue which the court has undertaken to charge upon, the objections required by Article 1971, take the place of special charges, and render it unnecessary that the latter be tendered.* It is immaterial whether the matter objected to in the court's charge is a *mere defective or incomplete statement of the law or issue to be determined, or is affirmatively erroneous; objections which sufficiently specify the error will preserve the point on appeal, without the necessity of again directing the court's attention to the same subject by special charge.*" (Italics are ours.)

The statutory provisions considered by the Supreme Court were the statutes prevailing at the time this case was tried in December, 1923 (R. 27); and it may be said in passing though not material to the case, that in the revision of the State statutes that has been had since the trial the provisions quoted by the Supreme Court have been continued in effect.

The Railroad Company in the trial court objected to the charge on the measure of damages and the special issues submitting the same, the objections specially directing the attention of the trial court to the failure to fully and properly instruct the jury as to their obligations to reduce to present values pointing

out that the charge as given did not properly do so, and the overruling of these objections are assigned as error. (Our Br. pp. 21 to 22 and 33 to 34.)

So clearly under the G. C. & S. F. v. Conley case, even if no special charge had been asked on the question of damages, the question as to the failure to properly and fully instruct the jury to reduce to present values and the consequent deprivation of a right under a Federal statute—are clearly raised.

And this case in the Court of Civil Appeals, so far as the assignments objecting to the Court's charge are concerned, did not go off on any question of failure to ask a special charge correcting the error. The assignments objecting to the court's charge are disposed of on their merits as follows:

> "Appellant lodges numerous objections to that portion of the Court's charge for the jury's guidance in assessing the amount of damages. We have read carefully the charge and find that it lays down the correct rule as approved by the United States Supreme Court and the courts of this state. C. & O. Ry. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117; I. & G. N. v. McVey, 99 Tex. 28. Appellant labors at great length to show that the trial court did not instruct the jury to reduce future contributions as appellees had a right to expect from the deceased, had he lived, to a present value. We find no merit in this. The language of the charge was that they should fix same 'at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss, etc.' The language '*At this*

time' clearly encompassed present value of future expectations." (R. 128.)

So far as the special charges refused are concerned and the assignments complaining of such refusal, they were passed upon by the Court separately and without any reference to the assignments complaining of the overruling of the objections to the charge (R. 129-130).

So here as in *C. & O. v. DeAtley*, 241 U. S. 310, 60 L. Ed. 1016, the State appellate court having passed upon the questions of law involved under the assignments and assumed to decide them, in that connection denying to petitioner the rights under the Federal law it claimed in the assignments, the questions are before this Court as questions of law, and to paraphrase the language of this Court in the DeAtley case, "since the court of appeals assumed to decide them, it is incumbent upon us (this Court) to review the decision."

The Court of Civil Appeals having passed upon the assignments and the questions raised, there is no question of trial court practice and the proper way to raise the questions, involved.

In *North Carolina v. Zachary*, 232 U. S. 248, this Court says:

> "And since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is

> our duty to pass upon the merits of the Federal question."

And in *Montana v. Haire, et al*, 204 U. S. 291, this Court says:

> "Where it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue, was actually decided against the Federal claim, and the decision on the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error."

To the same general effect are: *Miedreich v. Lauenstein*, 232 U. S. 236, 58 L. Ed. 584; *Chambers v. B. & O. Ry. Co.*, 207 U. S. 142, 52 L. Ed. 143; *Home v. New York City*, 187 U. S. 155, 47 L. Ed. 117.

(4)

At pages 25 to 27 of their Brief, respondent's counsel asks that the fact—shown by the undisputed testimony of the jury—that no attempt was made to reduce to present values, be disregarded, and in that connection refers to the decision in Caylat v. Railway Company, 113 Tex. 131.

All that was decided in the Caylat case is that it may be shown by affidavits of jurors that there was an error in writing up the verdict that had been determined so as to make it speak just the opposite of what was intended, and that when this was shown by the unanimous voice of the jury, a new trial should be granted.

There the unanimous voice of the jury was established before the court by the use of affidavits which the court says were "in practically the same language" (113 Texas 135) showing evidently that they had been given form by the attorneys in the case.

In this case the unanimous voice of the jury is shown by the examination and cross-examination of the jurors themselves in open court—a very much more reliable way to make the showing.

This was done under the provisions of a special act of the Texas Legislature which is quoted in the Caylat case as follows:

> "In 1905 the legislature passed a statute which has since been embodied in the Codification of 1911 as Art. 2021, reading as follows:
>
> " 'Where the ground of the motion is misconduct of the jury or of the officer in charge of same, or because of any communication made to the jury, or because the jury received other testimony, the court shall hear evidence thereof, and it shall be competent to prove such facts by the jurors or others in open court; and if the misconduct proven, or the testimony received, or the communication made, be material, a new trial may, in the discretion of the court, be granted.' "

And it was done in pursuance of a ground of the motion for new trial as follows:

> "There has been misconduct on the part of the jury in their deliberations and the determination in this cause and their verdict herein resulting from a failure to follow the law.

"That the jury did not, as the law requires, reduce or attempt to reduce the amount of probable contributions that might have been made by Moser to his wife and to his child to a present value, and did not in their deliberations and determination of their verdict consider what the amount awarded might be made to earn if placed at interest and in safe investment, as is contemplated by law, and did not calculate or undertake to calculate the value of the contributions, all of which this defendant is ready to verify by the examination of the jury." (R. 49.)

The testimony and its consideration by the Court and the action of the court adverse to the Railroad Company's motion are all properly brought forward in the record (defendant's bill of exception G, R. 55 to 77).

Petitioner in the trial court and in the Appellate Courts by objections made at the proper time and place, challenged the sufficiency of the charge to make the jury understand—that is, to convey to the mind of an ordinary layman—the rule of the Kelly case that contributions to be made through the years must be reduced to present value.

It is insisted by respondent, however, that the charge was full enough and was sufficient to convey to the minds of the jury this important rule; and the Court of Appeals holds that "the language 'at this time,' clearly encompassed present value of future expectations," meaning, we take it, that it was sufficient to convey the rule to the minds of the jury.

If such is a proper construction of the effect of the charge (which we think it is not), then the argument may certainly proceed on the assumption that the jury being of average intelligence understood and are to be taken as understanding under the charge that it was their duty to reduce to present values; and if they did not do so that they disobeyed the charge of the Court.

The Texas statute quoted permits misconduct of the jury to be shown by the oral examination in open court.

In the recent case of *G. C. & S. F. Ry. Co. v. Harvey*, 276 S. W. 895, the Supreme Court of this State says:

> "As has been seen, the jury were expressly directed by the judge to disregard the legal effect of their answers to the questions submitted, but to answer each according to the court's instructions. And *yet, in violation of this express direction*, they made an agreement to give the defendant in error a certain sum as damages and then to answer the other questions so she should 'get the money.' • • • No agreement could lawfully have been made such as was made. Its making was an infringement of the legal rights of both parties *and a violation of the orders of the court*, from which manifest injury to the defendant in error ultimately resulted."

And later on in the opinion with reference to the agreement the court says:

> "Its making was in the *very teeth of the in-*

structions given to them by the trial court, to obey which was their duty as jurors."

(The italics are ours.)

And again:

"In the case of Payne v. Smith, 266 S. W. 441, the trial court told the jury not to consider certain testimony as to the amount paid by the plaintiff for medical services. Upon motion for new trial, two of the jurors testified the jury had included in the amount found for the plaintiff this sum. The trial court denied the motion and the Court of Civil Appeals held this was error citing with approval Southern Traction Co. v. Wilson, 254 S. W. 1104; H. & T. C. Ry. Co. v. Gray, 105 Texas, 42; Hines v. Perry, 238 S. W. 886; Payne v. Harris, 241 U. S. 1008, and San Antonio Traction Co. v. Cassanova, 154 S. W. 1190. In the case last cited, it is expressly held that the action of the jury in disregarding the instruction of the court was such misconduct as to require the granting of a new trial."

We submit that there can be no clearer misconduct on the part of the jury than to disregard and refuse to follow the charge of the court, and it will be noted from the Payne v. Smith case, 266 S. W., quoted from by the Supreme Court of Texas with evident approval, the only misconduct involved was the disobedience of the instructions of the court.

It is not our purpose to go into the details of the argument made in the State courts on the question of the misconduct of the jury.

We have not brought forward specifically the ques-

tion of misconduct on the part of the jury in our application to this Court because the trial court having exercised its discretion in overruling the motion for new trial, the question of misconduct of the jury is one that this Court is not disposed to review. *Mattox v. U. S.*, 146 U. S. 140.

Besides this, the more we have considered the matter the more absolute to our minds it is that the error of the jury in not attempting to reduce to present values is chargeable to the Court and not to the jury.

We have gone thus far into the matter, however, that this Court may see that the testimony of the jury is brought before the Court under the express provisions of a Texas Statute and to sustain the charge that if the jury was in fact instructed to reduce to present values, that they disregarded the charge and were guilty of misconduct, resting the charge of misconduct on the express holdings of the Texas Courts that to disregard the court's charge was misconduct, under this statute.

The Railroad Company, beginning in the trial court, consistently insists that it has been deprived of a right under the Federal statute because the correct rule for measuring the damages has not been laid down and applied.

And following the Texas Statute expressly defining the practice it shows by the unanimous voice of the jury—all that were examined, nine of them—that *as a matter of fact* the Railroad Company was denied this Federal right.

So the unchallenged truth is that the jury verdict was arrived at in disregard of the Railroad Company's right.

But, not denying that the fact is established, nor that it is properly in the record, it is insisted that the Court should shut its eyes to the truth.

In the *Mattox v. U. S.* case, 146 U. S. 140, the following quotation from the opinion of Justice Brewer while on the Supreme Court of Kansas is made:

> "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusion of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to their verdict.
>
> "But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received."

We submit that the reason stated in the second paragraph of this quotation is the one applicable to the showing here.

It is the unanimous voice of the jury that speaks here—that is, practically so—that establishes the ma-

terial fact; not the voice of one or two jurors seeking to overthrow the verdict. It is not the secret thought of one or of a few, but the unanimous voice of all who speak as to overt acts—no calculation was made, no figures used, no attempt to reduce to present values. Of course if any such attempt had been made it must have been known to practically all of the jury.

The testimony of this jury is not essential to our case. We challenged the propriety of the court's charge pointing out that it was too vague and indefinite and did not require reduction to present value, before the charge was read.

And under an analysis of the amount of the verdict made in the light of the testimony in the case and applying the rules of the Kelly and Gainey cases and made as has been done by courts of last resort in a number of cases both before and since the Kelly case decision was rendered (our Br. pp. 39 to 45), it is manifest that the rule of the Kelly case was not applied and that our objections to the court's charge were well taken.

Under the express rule of a Texas Statute with full opportunity for cross-examination, for a perfectly legitimate purpose, the jury are examined and by unanimous voice they show that the Railroad Company was right in its criticism of the charge—that it was too general and that it did not carry to the minds of the jury the highly important rule; and the testimony is properly brought forward as a part of the record.

A great judge has said: "While sacred is the verdict of a jury, more sacred is the right and justice of a cause."

Then why should testimony brought into the record by an established rule of practice and unchallenged, which absolutely and affirmatively shows beyond question that the defendant has been deprived of a substantial right, be disregarded?

After setting forth considerable of the testimony of the jury, counsel for respondent, predicating his statement on such testimony, says:

> "In the case at bar there was no misconduct on the part of the jury, no improper discussion during its deliberations; no new evidence received; each member of the jury having heard and considered the evidence and the charge of the court as he understood it." (Res. Br. 27.)

So he appeals to the testimony of the jury to establish that there was no misconduct and that the jury heard and considered the evidence and charge of the court and they understood it.

But he challenges the right of the Court to look to this same testimony that it may see that the charge as the jury understood it *did not* require any reduction to present values and that none was attemped.

(5)

The brief comments as to the other assignments made by respondent, pp. 27 to 29, need no response.

Aside from the quotation from the Holbrook case they make practically no reply to what we have said.

As to the Holbrook case we have not been able to find in any report of that case what the testimony as to personal qualities was. But surely the vague and indefinite showing made as to Moser's qualifications in this case were not sufficient to warrant submitting the issue to the jury.

Respectfully submitted,

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